

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11 NSIGHT, INC., No. C-04-3836 MMC  
12 Plaintiff,  
13 v.  
14 PEOPLESOFt, INC., **ORDER GRANTING IN PART AND**  
15 Defendant **DENYING IN PART DEFENDANT'S**  
16 **MOTION TO DISMISS; AFFORDING**  
17 **PLAINTIFF LEAVE TO FILE SECOND**  
18 **AMENDED COMPLAINT; VACATING**  
19 **HEARING**  
20   
21   
22   
23 Before the Court is defendant PeopleSoft, Inc.'s motion to dismiss plaintiff's First  
24 Amended Complaint ("FAC"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
25 Procedure. Plaintiff nSight, Inc. has filed opposition, to which defendant has replied.  
26 Having read and considered the papers filed in support of and in opposition to the motion,  
the Court deems the matter suitable for decision on the papers, VACATES the hearing  
scheduled for June 3, 2005, and rules as follows.  
27   
28 1. The First Cause of Action, alleging a violation of § 1 of the Sherman Act, and the  
Third Cause of Action, alleging a violation of § 3 of the Clayton Act, are not subject to  
dismissal for failure to allege antitrust injury, because plaintiff alleges that prices in the  
relevant market<sup>1</sup> have risen as a result of defendant's alleged antitrust violations. See FAC  
1 Plaintiff alleges it competes with defendant in a market identified as "implementing  
or customizing PeopleSoft Manufacturing Automation software' for medium-sized  
businesses in the United States." (See FAC ¶ 21.)

1 ¶ 23; Pinhas v. Summit Health, 894 F. 2d 1024, 1032 (9th Cir. 1992) (holding, where  
 2 plaintiff alleged defendants attempted to remove plaintiff from medical service market,  
 3 plaintiff's allegation he performed services at lower cost than defendants was sufficient to  
 4 allege antitrust injury; stating "preclusion of [plaintiff] from practicing could conceivably  
 5 injure competition by allowing other similar doctors to charge higher prices"). Further, the  
 6 First and Third Causes of Action are not subject to dismissal for failure to allege a tying  
 7 claim, because plaintiff alleges that defendant has conditioned the sale of defendant's  
 8 software upon the purchase of defendant's customization and implementation services.  
 9 See FAC ¶ 28; County of Tuolumne v. Sonora Community Hospital, 236 F. 3d 1148, 1157  
 10 (9th Cir. 2001) (holding "tying arrangement exists when a seller conditions the sale of one  
 11 product or service . . . on the buyer's purchase of another product or service").

12 2. The Second Cause of Action, alleging a violation of § 2 of the Sherman Act, is  
 13 subject to dismissal. To the extent the claim is based on a monopolization theory, plaintiff  
 14 fails to allege that defendant possesses "monopoly power in the relevant market," let alone  
 15 that defendant has engaged in "willful acquisition and maintenance of that power." See  
 16 Smilecare Dental Group v. Delta Dental Plan of California, Inc., 88 F. 3d 780, 783 (9th Cir.  
 17 1996) (setting forth essential elements of claim for monopolization). To the extent the claim  
 18 is based on an attempt to monopolize theory, plaintiff fails to allege that defendant has a  
 19 "dangerous probability of success" in its attempt to control the relevant market. See *id.*  
 20 (setting forth essential elements of claim for attempt to monopolize).

21 3. The Fourth Cause of Action, alleging a claim for false advertising in violation of  
 22 15 U.S.C. § 1125, is subject to dismissal. Defendant's alleged statements that plaintiff's  
 23 implementation services were "inferior to [defendant's] services" and that plaintiff's  
 24 consultants were "not professionals in implementing [defendant's] software," (see FAC  
 25 ¶ 28), are "the kind of 'puffery' that does not qualify as a statement of fact capable of being  
 26 proved false." See, e.g., Coastal Abstract Service, Inc. v. First American Title Ins. Co., 173  
 27 F. 3d 725, 731 (9th Cir. 1999) (holding defendant's statement that plaintiff was "too small"  
 28 to handle customer's business needs was actionable puffery); Cook, Perkiss and Liehe,

1 Inc. v. Northern California Collection Service, Inc., 911 F. 2d 242, 246 (9th Cir. 1990)  
 2 (providing as examples of actionable puffery statements that defendant provided “best  
 3 technology” and “better customer service” than its competitors).

4       4. The Fifth Cause of Action, alleging monopolization and attempt to monopolize in  
 5 violation of the Cartwright Act, is, for the reasons stated with respect to the Second Cause  
 6 of Action, subject to dismissal. See Marin County Board of Realtors, Inc. v. Palsson, 16  
 7 Cal. 3d 920, 925 (1976) (holding because Cartwright Act is patterned after Sherman Act,  
 8 “federal cases interpreting the Sherman Act are applicable to problems arising under the  
 9 Cartwright Act”).<sup>2</sup>

10       5. The Sixth Cause of Action, alleging a claim for breach of the covenant of good  
 11 faith and fair dealing, and the Eighth Cause of Action, alleging a claim for breach of  
 12 contract, are not subject to dismissal for failure to sufficiently allege the nature of the  
 13 breach. Plaintiff alleges that the parties’ “Teaming Agreements” required defendant, as  
 14 “prime vendor,” to “farm out the services contract” to plaintiff, and that defendant breached  
 15 the Teaming Agreements by failing to do so. (See FAC ¶¶ 17, 20.)

16       6. The Seventh Cause of Action, alleging a claim for breach of fiduciary duty, is  
 17 subject to dismissal because plaintiff fails to allege any facts to support a finding that  
 18 defendant owed plaintiff, one of defendant’s competitors in the relevant market, a fiduciary  
 19 duty. Plaintiff’s allegation that it had a contractual relationship with defendant is, standing  
 20 alone, insufficient. See Wolf v. Superior Court, 107 Cal. App. 4th 25, 31 (Cal. App. 2003)  
 21 (holding fact that “[e]very contract requires one party to repose an element of trust and  
 22 confidence in the other to perform” insufficient to create fiduciary duty on part of contracting  
 23 party).

24       7. The Ninth Cause of Action, alleging a violation of § 17200 of the California  
 25

---

26       2As pleaded, the Fifth Cause of Action could be interpreted as, in part, a claim for  
 27 tying in violation of the Cartwright Act. (See FAC ¶ 38 (alleging defendant “has entered into  
 28 contracts in restraint of trade).) The Tenth Cause of Action, however, specifically alleges  
 tying in violation of the Cartwright Act. (See FAC ¶ 52.) Accordingly, the Court does not  
 interpret the Fifth Cause of Action to include tying.

1 Business and Professions Code, is not subject to dismissal because plaintiff has alleged  
2 unlawful activity on the part of defendant, for example, unlawful tying.

3 8. The Tenth Cause of Action, alleging tying in violation of the Cartwright Act, is, for  
4 the reasons stated with respect to the First and Third Causes of Action, not subject to  
5 dismissal. See Marin County Board of Realtors, 16 Cal. 3d at 925 (holding “federal cases  
6 interpreting the Sherman Act are applicable to problems arising under the Cartwright Act”).

7 9. The Eleventh Cause of Action, alleging a claim of trade libel, is, for the reasons  
8 stated with respect to the Fourth Cause of Action, subject to dismissal. See Coastal  
9 Abstract Service, 173 F. 3d at 730-31 (holding “puffery” by plaintiff’s competitor not  
10 actionable under California defamation law).

11 10. The Twelfth Cause of Action, alleging a claim for intentional interference with  
12 prospective business advantage, is not subject to dismissal. Plaintiff alleges that it had an  
13 expectation of economic benefit from third parties IMI Cornelius and Interstate Batteries,  
14 that defendant had knowledge of said relationships, that defendant intended to disrupt said  
15 relationships when defendant engaged in unlawful tying activity, that the relationships were  
16 disrupted by defendant’s conduct, and that plaintiff incurred financial loss as a result  
17 thereof. See FAC ¶¶ 19, 25, 27; Westside Center Assocs. v. Safeway Stores 23, Inc., 42  
18 Cal. App. 4th 507, 521-22 and n. 17 (1996) (setting forth essential elements of claim for  
19 intentional interference with prospective business advantage).

20 11. The Thirteenth Cause of Action, alleging a claim for fraud, is subject to  
21 dismissal. Plaintiff fails to allege “the time, place, and content of the alleged fraudulent  
22 representation or omission [and] the identity of the person engaged in the fraud,” see In re  
23 GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir.1994), and fails to allege facts to  
24 support a finding that any such representation and/or omission was false when made, see  
25 Fecht v. Price Co., 70 F. 3d 1078, 1083 (9th Cir. 1995) (holding plaintiff alleging fraud must  
26 allege facts to support finding representations were false when made), cert. denied, 517  
27 U.S. 1136 (1996).

28 //

## CONCLUSION

2 For the reasons stated above, defendant's motion to dismiss the First Amended  
3 Complaint is hereby GRANTED in part and DENIED in part, as follows:

4           1. The Second, Fourth, Fifth, Seventh, Eleventh and Thirteenth Causes of Action  
5 are hereby DISMISSED.

6 || 2. In all other respects, the motion is DENIED.

7       3. Plaintiff may file a Second Amended Complaint, no later than June 17, 2005, to  
8 cure the deficiencies identified above. If plaintiff does not file a Second Amended  
9 Complaint within the time provided, the action will proceed on the remaining claims in the  
10 FAC.

## IT IS SO ORDERED.

13 || Dated: June 1, 2005

/s/ Maxine M. Chesney  
MAXINE M. CHESNEY  
United States District Judge